IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3148 OF 2006

AND

WRIT PETITION NO.43 OF 2007

Travel Corporation (India)
Private Limitd,
Chander Mukhi, Nariman Point,
Mumbai - 400 021. .. Petitioner.

V/s.

1. Asstt.Commissioner of
Income-tax, Central Circle 47
Aayakar Bhuvan,
Mumbai - 400 020.

2. Dy.Commissioner of Income-
tax, Central Circle 47,
Aayakar Bhavan,
Mumbai - 400 020.

3. Commissioner of Income-tax,
Bombay City X , Aayakar
Bhavan, Mumbai - 400 020.

4. Union of India,
Ministry of Law,
Mumbai - 400 020 .. Respondents.

Mr.Arun Sathe, Senior Advocate with Mr.Mandar Vaidya for the petitioner.

Mr.B.M. Chatterjee with Ms.Poonam Bhosale for the respondents.

CORAM : F.I. REBELLO &
J.P. DEVADHAR, JJ.

DATED : 17TH JULY, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. In these two petitions, the challenge is to the two notices both dated 6th March, 2006 whereby

the completed assessments for A.Y.2000-01 and A.Y. 2001-02 are sought to be reopened under Section 148 of the Income Tax Act, 1961 ('Act' for short).

2. Since the reasons recorded for reopening of the assessments are common, both these petitions are heard together and disposed off by this common judgment.

3. Although the facts are not in dispute, to appreciate the rival contentions, we may note few facts in Writ Petition No.43 of 2007.

4. Return of income filed by the petitioner/assessee for A.Y.2000-2001 was assessed under Section 143(3) of the Act on 28-3-2003. By the said assessment order, deduction under Section 80HHD was allowed to the extent of Rs.3,28,09,526/- as against the amount claimed at Rs.5,48,71,321/-. On appeal filed by the assessee, the CIT (A) by his order dated 21-11-2003 allowed entire amount claimed by the assessee under Section 80HHD of the Act. Further appeal filed by the revenue against the order of C.I.T. (A) is pending before the Income Tax Appellate Tribunal.

5. In the meantime, based on the audit

objection, the assessing officer issued a notice dated 13th September, 2004 under Section 154 of the Act, so as to rectify the assessment by withdrawing the deduction allowed under Section 80HHD of the Act. The assessee in its reply stated that no rectification was necessary because, there was no violation of the provisions of Section 80HHD and that the deduction allowed under Section 80HHD was in accordance with law. No further action was taken by the Assessing Officer in furtherance of the notice issued under Section 154 of the Act.

6. However, by the impugned notices both dated 6th march, 2006 issued under Section 148 of the Act, the Assessing Officer sought to reopen the assessment for A.Y. 2000-2001 and 2001-02 respectively. Reasons recorded by the Assessing Officer for reopening of the said assessments read thus :

> "As per sub section-4 of section 80HHD, the amount credit to Reserve Account under sub-Clause (b) of sub-section (1) shall be utilized by the assessee before the expiry of period of five year next following the previous year in which the amount was credited for (1) construction of new hotel (2) purchase of new car and new coaches (3) purchase of sports equipments (4) construction of conference centre and (5) provision of other facilities for the growth of Indian tourism and subscription to eligible issue of equity shares.
>
> Where in amount credit to the Reserve

> Account has been utilized for any purpose other than those referred to in sub-section (4), the amount so utilized shall be deemed to be profit and shall be charged to tax in the year in which the amount was so utilized.
>
> It is seen from the balance sheet as on 31/03/2000 that the assessee has an opening balance of Rs.16.25 Cr. in its Reserve Account (80HHD). The assessee transferred Rs.7,89,46,000/- to 80HHD Utilized Account but actually utilized only Rs.4,60,96,779/- (wrongly recorded as Rs.4,16,96,779/-) (maximum) for specific purpose and utilized the balance of Rs.3,28,49,221/- for the purpose other than those referred in sub-section (4). Therefore, the amount so utilized of Rs.3,28,49,221/- should have been taxed as deemed profit. Therefore, I have reasons to believe that the income to the extent of Rs.3,28,49,221/- as escaped from assessment for the A.Y.2000-01 within the meaning of provision of section 147 of the I.T. Act, 1961.

7. The assessee by its letter dated 31-7-2006 objected to the reopening of the assessment by setting out various reasons. However, by an order dated 13th November, 2006, the Assessing Officer rejected the objections filed by the assessee. Challenging the notices issued under Section 148 of the Act as well as the order passed by the assessing officer on 13th November, 2006 rejecting the objections filed by the assessee, the present petitions are filed.

8. Before dealing with the rival contentions, we may refer to the scope of deduction available under Section 80HHD of the Act. The said Section

was inserted by the Direct Tax Laws (Amendment) Act, 1989 with effect from 1-4-1989. It provides for deduction in respect of earnings of a hotel or tour operator or travel agent in convertible foreign exchange. Although, 100% of the profits derived by such hotels, tour operators and travel agents from services rendered to foreign tourists are allowable under Section 80HHD, only 50% of profits are allowed directly in the assessment year in question and balance 50% is allowed only to the extent it is credited to a reserve account and subsequently utilised for making certain specified investments for the business of the assessee. In other words, if the assessee fails to utilise the amount credited to the '80HHD reserve account' for the purpose of its business in the manner laid down in Section 80HHD(4) of the Act or utilises the amount for the purposes other than those specified in Section 80HHD(4) of the Act, then the amount so utilised becomes chargeable to tax.

9. Mr.Sathe, learned Senior counsel appearing on behalf of the petitioner submitted that in the present case, the total amount credited to the '80HHD reserve account' during the A.Y. from 1989-90 to 1999-2000 was Rs.16,25,00,000/-. During the specified period, the assessee had utilised a

sum of Rs.10,50,71,000/- for the purposes specified in Section 80HHD(4) of the Act. The said amount of Rs.10,50,71,000/-, thus became a free reserve. Out of the said sum of Rs.10,50,71,000/- the assessee had appropriated a sum of Rs.2,61,25,000/- (Rs.1,41,25,000/- in A.Y. 1999-2000 and Rs.1,20,00,000/- in A.Y.2000-2001) and, therefore, the balance amount of Rs.7,89,46,000/- (Rs.10,50,71,000 - Rs.2,61,25,000) which had become a free reserve was transferred from '80HHD reserve account' to '80HHD utilised account'. Such a transfer, according to Mr.Sathe did not in any way violate the provisions of Section 80HHD of the Act.

10. Mr.Sathe further submitted that the above facts were specifically set out in the objections filed by the assessee for reopening of the assessments. However, the Assessing Officer totally ignored the above facts and by referring to the Annual Report of the assessee, erroneously construed that out of Rs.7,89,46,000/- transferred to the '80HHD utilised account' the petitioner has utilised only a sum of Rs.4,60,96,776/- for the purposes specified in Section 80HHD (4) and opined that the differential amount is liable to be taxed. Mr.Sathe submitted that in the present case the fact that the assessee has utilised a sum of Rs.10,50,71,000/- in

the previous years for the purposes specified in Section 80HHD of the Act is not disputed by the revenue. Once it is accepted by the revenue that a sum of Rs.10,50,71,000/- has been utilised for the purpose specified in Section 80HHD(4), then transferring the said amount or any part thereof from '80HHD reserve account' to the '80HHD utilised account' would be in no way in violation of the provisions of Section 80HHD. Accordingly, Mr.Sathe submitted that the reopening of the assessments on the ground that the amount transferred from the '80HHD reserve account' have not been utilised for specified purposes set out in Section 80HHD is wholly unsustainable and consequently the impugned notices are liable to be quashed and set aside.

11. Mr.Chatterjee, learned counsel appearing on behalf of the respondents, on the other hand, submitted that in the present case reopening of the assessment is based on the audit objections and it is well established in law that the assessments can be reopened based on audit objections. In this connection, he relied upon a judgment of the Apex Court in the case of **CIT V/s. PVS Beedies Pvt Limited reported in 237 ITR 13**.

12. Mr.Chatterjee submitted that in the Annual

Report, the assessee has recorded that during the F.Y.1999-2000, had acquired assets worth Rs.4,60,96,779/- have been acquired. Admittedly, during the year in question, the assessee has transferred from the '80HHD reserve account' to the '80HHD utilised account' a sum of Rs.7,89,46,000/-, whereas the assets acquired only to the tune of Rs.4,60,96,779/-. Thus, it is apparent that the differential amount of Rs.3,28,49,221/- (Rs.7,89,46,000/- - Rs.4,60,96,779/-) has not been utilised for the purpose specified in Section 80HHD (4) of the Act. As the above differential amount has escaped assessment, reopening of the assessments is justified. Mr.Chatterjee further submitted that even after the assessments are reopened it is open to the petitioner to establish that the provisions of Section 80HHD(4) have not been violated and in that event, the proceedings would be dropped. Therefore, in the facts and circumstances of the case, the petitioner has not made out a case for grant of any relief and the petition is liable to be dismissed.

13. We have carefully considered the rival submissions. Under the Income Tax Act, concluded assessments can be reopened only if the assessing officer has reason to believe that the income

chargeable to tax has escaped assessment. The reasons for reopening the assessments must be genuine, reliable and not imaginary or based on conjectures or surmises. In the present case, the specific case of the assessee is that as against the credit of Rs.16,25,00,000/- in the '80HHD reserve account', during the assessment years from 1989-90 to 1999-2000, a sum of Rs.10,50,71,000/- has been utilized for the purposes specified in Section 80HHD (4) of the Act. Accordingly, it was contended before the assessing officer that out of the sum of Rs.16,25,00,000/- a sum of Rs.10,50,71,000/- had become free reserve. Out of the said free reserve amount of Rs.10,50,71,000/- a sum of Rs.2,61,25,000/- had already been appropriated in the profit and loss account and, therefore, the balance free reserve amount of Rs.7,89,46,000/- (Rs.10,50,71,000/- - Rs.2,61,25,000/-) has been transferred to '80HHD utilised account' so as to utilise the same for any purpose whenever found necessary. The claim of the assessee that a sum of Rs.10,50,71,000/- has been utilised within the specified period and for the purposes set out in Section 80HHD(4) has not been doubted or found to be incorrect. Even before us, the learned counsel for the revenue has not disputed the claim of the assessee that during the relevant period, a sum of

Rs.10,50,71,000/- has been utilised for the purposes set out in Section 80HHD(4) of the Act.

14. Thus, it is established by the assessee that after crediting a sum of Rs.16,25,000/- to the '80HHD reserve account', a sum of Rs.10,50,71,000/- has been utilised for the purposes specified in Section 80HHD(4) of the Act. As a result, the assessee could draw a sum of Rs.10,50,71,000/- from the '80HHD reserve account' which had become a free reserve and utilise the same for any purpose as the assessee deemed fit and proper. The fact that the free reserve amount has been transferred to the '80HHD utilised account' does not mean there is violation of Section 80HHD(4) of the Act. In other words, where the assessee has already complied with the requirements of Section 80HHD(4) of the Act, the question of complying with the said provisions once again does not arise. To put it simply, where the assessee utilises certain amount for the purposes specified in Section 80HHD(4) and draws that much amount from the '80HHD reserve account', it would be open to the assessee to utilise the said amount for any purpose it deems fit and proper. In the present case, instead of utilising the amount so drawn, the assessee has transferred the said amount to a separate account called '80HHD utilised account'.

In such cases, it cannot be said that there is violation of Section 80HHD and consequently it cannot be said that the income has escaped assessment.

15. The argument of the revenue based on the audit report and the annual report of the assessee that out of the amount Rs.7,89,46,000/- drawn from the '80HHD reserve account', the assessee has utilised only Rs.4,60,96,779/- for the purposes specified in Section 80HHD(4) is wholly misconceived because, firstly, there is no actual withdrawal of the amount of Rs.7,89,46,000/- from the '80HHD reserve account' and the assessee has merely transferred the said amount to the '80HHD utilised account' and secondly, it is not even the case of the assessee that transfer of the amount of Rs.7,89,46,000/- to the '80HHD utilised account' constitutes utilisation of the amount for the purposes set out under Section 80HHD(4) of the Act. The specific case of the assessee is that Rs.7,89,46,000/- represents free reserve out of the total free reserve amount of Rs.10,50,71,000/- and as seen earlier, the revenue has not disputed that Rs.10,50,71,000/- has become a free reserve. Thirdly, it is not even the case of the assessee that out of the sum of Rs.7,89,46,000/- transferred

to the '80HHD utilised account', a sum of Rs.4,60,96,779/- has been utilised for the purposes specified under Section 80HHD (4) of the Act. Therefore, treating the differential amount of Rs.3,28,49,221/- (Rs.7,89,46,000/- - Rs.4,60,96,779/-) as utilisation for the purposes other than those specified under Section 80HHD(4) of the Act does not arise at all. Thus, the inference drawn by the assessing officer from the Annual Report of the assessee that the amounts credited to the '80HHD reserve account' has not been utilised for the specified purposes and consequently the income chargeable to tax has escaped assessment is wholly misplaced and is totally contrary to the facts on record.

16. In the result, the petition succeeds. The impugned notices both dated 6th March, 2006 issued under Section 148 of the Act as well as the order rejecting the objections are quashed and set aside. Rule is made absolute in terms of this order with no order as to costs.

(F.I. REBELLO, J.)

(J.P. DEVADHAR, J.)

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WRIT PETITION NO.3148 OF 2006

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Date of decision: 17TH JULY, 2007.

For Approval and signature

The Hon'ble Justice F.I. REBELLO

AND

The Hon'ble Mr. Justice J.P.DEVADHAR

1) Whether to be referred to the Reporter or not?)

2) Whether the Reporters of the Local papers may be allowed to see the Judgment/Order?)

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Transcribed by : A.G. Kulkarni,
P.A. to J.P. Devadhar, J.